No. 4138

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE COPPER COMPANY, a Corporation,
Plaintiff in Error.
vs.
JOE JABER,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF PLAINTIFF IN ERROR

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Filed this.....day of....., 1923.

FRANK D. MOUCKTON,
Clerk.

By.....
Deputy Clerk.

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STATEMENT OF THE CASE

Defendant in Error, Joe Jaber, brought suit against the Plaintiff in Error, United Verde Copper Company, a corporation, in the Superior Court of Yavapai County, Arizona, for an alleged injury to his ear. The suit was brought under the Arizona Employers' Liability Law, claiming damages in the sum of Ten Thousand ($10,000) Dollars. The suit was removed to the United States District Court for the District of Arizona.

Jaber was employed by the Copper Company as a mucker during the latter part of June, 1922, including June 27th of that year, the day upon which he alleges he was injured.

Jaber alleged in Paragraph IV of his Amended

Complaint (T. of R., p. 13) that his injuries were caused by an accident which was due to a condition or conditions of his occupation in the service of the defendant in a hazardous occupation.

That (see Paragraph III of said Amended Complaint, T. of R. p. 12) while in the employ of defendant and while plaintiff was in the pursuance of his duties, a heavy blast was set off in the near proximity to the plaintiff and that as a result of said blast, plaintiff suffered great pain in his left ear and has continued to suffer great pain in his said ear since said blast and that as a result of said injury and said shock caused by said blast, plaintiff has totally lost the hearing of said left ear.

The defendant denied and set up throughout the entire case;

1. That there was no blast in the vicinity of plaintiff sufficient to cause any injury to his ear, and,

2. That plaintiff was not injured at all but that he was suffering from disease occasioned by natural causes and that when he came to the hospital of the Company, he was suffering from said disease and was not suffering from any injury or accident whatsoever. The Company admitted practically throughout the trial that Defendant in Error had noises, pains and buzzings in his left ear but that the cause of said situation in the ear was the result of nephritis or Bright's disease and had no connection with and was not caused by any injury.

There were two defenses made by defendant:

1. That there was no blast set off in plaintiff's near proximity which could have caused the injury, and,

2. That the condition plaintiff complained of was the result of disease.

Jaber was working in the mine belonging to the Copper Company in what is known as the 1000 foot level, which is a large tunnel into which standard gauge railway cars are brought and loaded with ore.

It was the duty of Jaber to keep the floor of the tunnel and the tracks clear of ore or muck, which spilled over the sides of the cars when they were being filled, so that the cars could be operated thereon (T. of R., page 42).

The ore is loaded into the cars from what is called a raise or chute which comes out at the top of one side of the tunnel as illustrated in Defendant's "Exhibit 2" (T. of R., p. 19) and more fully described in the testimony of Mr. DeCamp on pages 61 and 62 of Transcript of Record.

Occasionally it becomes necessary to set off a blast in the chute because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute.

The Defendant in Error claimed that on the day in question, June 27, 1922, he was at work in the tunnel 35 or 40 feet away from the raise or chute, when a blast was set off in said raise or chute which injured his ear.

The theory of the Plaintiff in Error in its pleadings and at the trial was that the Defendant in Error was never injured either by a blast or otherwise but that he was suffering from nephritis or what is commonly called "Bright's disease."

The symptoms about which the plaintiff testified was that he had noises in his ear, buzzing and ringing in his ear and he claimed this was caused by a concussion from a blast. All of the physicians testified that this is known in medicine as tenitis and is one of the symptons of "Bright's" disease. The physicians who testified for the plaintiff found no rupture of the ear drum so there was no external evidence of any injury. All of the conditions testified to by the plaintiff were explained by the physicians testifying for the defendant as symptoms of nephritis or "Bright's" disease.

Doctor Walsh who is employed at the Company's hospital, and who saw the Defendant in Error when he first came to the hospital, stated that Jaber made no claim of injury when he came to the hospital, but stated that he was sick. An examination by this doctor, at that time, showed that Defendant in Error was suffering from nephritis or "Bright's" disease (T. of R., pp. 76 and 77).

Doctor Carlson (T. R., pp. 68 to 73) and Doctor Yount (T. R., pp. 89 to 92); witnesses on behalf of the Plaintiff in Error, testified that the Defendant in Error had "Bright's" disease and had no injury to his ear. Doctor Swetnam (T. R., pp. 73 and 79)

and Doctor Buck (T. R., pp. 82 to 89), were ear specialists, who also testified on behalf of the Plaintiff in Error and testified that Defendant in Error had no injury to his ears, and that his condition was due to diease and not any blast or concussion.

The whole theory of defendant's case was that this man had become sick and diseased and upon quitting his work and coming to the hospital of defendant company, the company doctors at that time and other doctors subsequent thereto found that this man was suffering from nephritis and that it had no connection whatsoever with any accident. The defendant company admitted, during the trial, that this man was still sick and still suffering from the effects of said disease.

Upon the trial of the case, Defendant in Error recovered a judgment for One Thousand ($1000.00) Dollars against the Plaintiff in Error upon which judgment was rendered and a motion for a new trial was denied.

The case is before this Honorable Court on Writ of Error to review the proceedings and findings of the United States District Court for the District of Arizona.

ERRORS RELIED ON FOR REVERSAL

There are only two questions involved in this case. The first and principal one is,

The refusal of the trial court to give the instruction requested by the Plaintiff in Error based upon its theory of defense, which was amply supported

by evidence produced by Plaintiff in Error, that the Defendant in Error was suffering from a disease and not from an injury, said disease being the cause of the pain, roaring and buzzing in his ear. The requested instruction being set forth in full on pages 113 and 114 of the Transcript of Record and in the Assignments of Error, set forth below.

Second, that the verdict of the jury is not supported by and is contrary to the evidence, being wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom and as set forth in the Assignments of Error below.

ASSIGNMENTS OF ERROR

1. That the United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of defendant's evidence.

2. That the United States District Court erred in refusing to give the following instruction requested by the defendant.

> "The Court instructs the jury that under the Employer's Liability Law the employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such

law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff's injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease. I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by injury received while in the employ of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

3. The verdict of the jury is contrary to law.

4. The verdict of the jury is not supported by and is contrary to the evidence.

5. The United States District Court of the District of Arizona erred in entering judgment

upon the verdict and said judgment is contrary to law.

6. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

7. The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial.

POINTS AND AUTHORITIES

I

The Arizona Employers Liability Law provides compensation for injuries received by employees while working in certain occupations declared to be hazardous, where such injuries are caused by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and is not caused by the negligence of the employee. The law does not provide any remedy for occupational diseases or ordinary sickness contracted while at work.

Constitution of Arizona, Article XVIII, Section 7.

Title 14, Chapter VI, Revised Statutes of Arizona, 1913, Civil Code.

Arizona Copper Co. vs. Hammer, 250 U. S., 400, 63 Law Ed., 1059.

II

It is the duty of the trial court to submit to the jury, and give instructions thereon, any issues,

theory or defense which the evidence tends to support.

Smith et al. vs. Carrington et al., 4 Cranch, 62; 2 Law Ed., 550.

Douglas vs. McAllister, 3 Cranch, 298; 2 Law Ed., 445.

Stoll vs. Loving, 120 Fed., 805, 57 C. C. A., 173.

Burgess Sulphite Fibre Co. vs. Drew 157 Fed., 212; 84 C. C. A., 660.

Morenci Southern Ry. Co. vs. Monsour, 21 Arizona, 148; 185 Pac., 938.

Southwest Cotton Co. vs. Ryan, 22 Arizona, 520; pp. 536 to 543.

III

The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom.

Lester vs. Snyder, 55 Pac., 613.

Georgia Central R. R. Co. vs. Woosley, 37 S. E., 392.

Waterbury vs. Chicago Mil. & St. P. Ry., 73 N. W., 341.

Ettlinger vs. Kahn, 36 S. W., 37.

Simon vs. Matson, 61 Pac., 478.

Jerome vs. Queen City Cycle Co., 57 N. E., 485.

Seymour vs. Seymour, 24 S. E., 493.

Vintroux vs. Simms, 31 S. E., 941.

Beall vs. Railway Co., 18 S. E., 729.

Stoffelo vs. Molina, 8 Arizona, 211.

Fish vs. Cotton Mills, 95 N. Y. Sup., 673.

Fieldhouse vs. Leisburg, 88 Pac., 214.

Rahles vs. Mfg. Co., 23 L. R. A., (NS) 296.

ARGUMENT

The first question we desire to present to this court, is whether or not the trial court erred in refusing to instruct the jury upon the theory of the Plainiff in Error, to-wit: That the Defendant in Error was suffering from a disease and not from an injury and therefore was not entitled to recover under the Employers Liability Law. The argument on this point divides itself naturally into two propositions:

First, the nature and remedies provided by the Arizona Employers Liability Law, and

Second, as to the duty of the court to give instructions upon an issue which is raised by the pleadings and supported by the evidence.

PROPOSITION I

> The Arizona Employers Liability Law provides compensation for injuries received by employees working in certain occupations declared to be hazardous where, such injuries are caused by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and is not caused by the negligence of the employee. The law does not provide any remedy for occupational diseases or ordinary sickness contracted while at work.

The Constitution of the State of Arizona, Ar-

ticle XVIII, Section 7, directs the Legislature to enact an Employers Liability Law in the following terms:

> "To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, the Legislature shall enact an Employer's Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

It will be noticed that this covers only "death or injury caused by any accident due to a condition or conditions of such occupation."

In compliance with the constitutional mandate, the Legislature of the State of Arizona enacted an Employers Liability Law which is Chapter VI of Title 14, Revised Statutes of Arizona, 1913, Civil Code, beginning at page 1051 thereof.

Section 3154 of the Civil Code is practically a repetition of the Constitutional provision and reads as follows:

> "That to protect the safety of employees

> in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Section 3155 and 3156 provide what occupations and employments are hazardous within the terms of the law. and Section 3158 provides to whom the employer is liable in case of accident or death.

The scope, the purpose and effect of the Arizona Employers Liability Law were passed upon by the Supreme Court of the United States in five cases which were decided on June 9, 1919, and are reported as Arizona Copper Company vs. Hammer, 250 U. S., 400; 63 Law Ed., 1059. In this decision, the law is thoroughly examined and construed by the Supreme Court of the United States.

From an examination of the Constitutional provision, the Employers Liability Law and the Hammer decision, supra, it can be readily seen that under this law there is no remedy provided for a

workman who becomes disabled on account of sickness or even for an occupational disease.

The theory of the plaintiff below, upon which his complaint was based, was that a blast was set off in the raise or chute and that the concussion thereof in the tunnel, in which he was standing 35 or 40 feet from such chute or raise, caused an injury to his left ear. If this were true, it would be an accident within the Arizona Employers Liability Law.

The theory of the defendant below, however, upon which its answer was predicated and in support of which, in our opinion, conclusive evidence was adduced, was that Jaber was not injured by a blast but that he was suffering from nephritis which cannot be caused by a concussion such as Jaber claimed, but is a disease which anyone may have and which takes a considerable time to develop.

If the Copper Company's theory was correct, then Jaber was not suffering from an injury caused by accident arising out of and in the course of his employment and due to a condition or conditions thereof,, and he was not entitled to any compensation under the Employers Liability Law because his condition was not included within the scope of that law.

PROPOSITION II

> It is the duty of the trial court to submit to the jury, and give instructions thereon, any issue, theory or defense which the evidence tends to support.

In its answer to the complaint, the Plaintiff in

Error denied that Jaber ever was injured and in support of its position it introduced evidence to show that he was suffering from nephritis.

Jaber, in his testimony, stated he was suffering from headaches, ringing in the ears, etc., and attributed this to an injury to his left ear. The physicians who testified for the Copper Company all stated that one of the symptoms of nephritis was such ringing in the ears and that the symptoms of which Jaber complained were the result of his nephritis and not of any injury to the ear. The medical witnesses for the Copper Company went into all of the symptoms in detail and all of them agreed that Jaber was not suffering from an injury to his ear but was suffering from nephritis or "Bright's" disease.

Under this state of the evidence the presiding Judge gave, among other instructions, one which explained the Arizona Employers Liability Law. The Copper Company, in support of its answer and the evidence introduced by it, prepared and submitted to the court one instruction which is set forth in full in Assignment of Error No. 2, supra. This instruction was refused by the Court and is the principal question now presented to this court for adjudication.

This question is not a new one. It has been passed upon a number of times by the United States Courts and enumerable times by various

state courts. The matter was twice before Chief Justice Marshall.

In the case of Douglas and Mandeville vs. McAllister, 3 Cranch, 298; 2 Law Ed., 445; reading from page 446:

> "The Court was certainly bound to give an opinion, if required, upon any point relevent to the issue."

Again in the case of Smith vs. Carrington, reported in 4 Cranch, 62; 2 Law Ed., at page 550, we find the following at page 553:

> "There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes causes for an exception; but it is equally clear that the Court cannot be required to give the jury an opinion on the truth of testimony in any case."

In order that a party may complain that the Court has refused to present its theory of the case, there are two elements required:

1. The theory must be presented in the pleadings.
2. There must be evidence to support the theory.

There can be no question but that the Plaintiff in Error in this case complied with these requirements.

It is the general rule that a Court must instruct the jury on all the issues of the case, even though

not requested to do so, in order that it may have some guidance in its deliberations. See

> Sections 514-516 Revised Statutes of Arizona, 1913, Civil Code.

and the case of

> Southwest Cotton Company vs. Ryan, 22 Arizona, 520.

beginning at bottom of page 536 to 543. At the top of page 538, the Court says:

> "It will be observed that Paragraph 514 says that 'the Court shall charge the jury.' The word 'shall' as here used, places this duty on the Court, and it is not conditioned upon a request from either party to the litigation. It is a step in a jury trial which the Court must perform whether aided by the attorneys or not."

At page 539, the Court Says:

> "If it had been the purpose of the law-making power to relieve the court from declaring the principles of law applicable to the points only when required by the parties, it doubtless would have spoken in stronger than merely permissive terms of the duty of the parties in this respect."

But in this case the Court was not left without any assistance, for the attorneys for the Plaintiff in Error submitted an instruction stating the law covering their theory of defense.

The law has again been stated in the following cases:

> Stoll vs. Loving, 120 Fed., 805; 57 C. C. A., 173 at page 176, the Court says:

> "While it may be conceded that the legal proposition stated by the court is in the abstract sound, it was inapplicable to the controversy, and misleading. Stoll's contention that Loving had made a contract with Shaw to the exclusion of Stoll, and that the work for the payment of which suit was brought was done under that contract, was not submitted to the jury, and it cannot be known from the verdict whether the jury passed on that question, which this Court, in its former opinion, pointed out was essential to the proper determination of the controversy. That decision should have been considered as controlling by the trial court, and the failure to submit this question makes it necessary to reverse the judgment and grant a new trial."

Burgess Sulphite Fibre Company et al., vs. Drew, 157, Fed., 212; 84 C. C. A., 660.

In the case of Morenci Southern Ry. Co. vs. Monsour, 21 Arizona, 148; 185 Pacific, 938, at page 942, the Supreme Court of Arizona says:

> "Finally the defendant complains because the Court refused an instruction offered by it defining contributory negligence. That was practically the only defense made by the defendant, and we think we have stated enough of the facts developed at the trial to show that there was substantial evidence to support this defense. In such case, it was the duty of the court to

> instruct the jury as requested. The tendered instruction was a correct statement of the law, and should have been given."

It is the general rule, and we think without any exception, in any of the courts in the United States, "that it is the duty of the Court to submit to the jury, and give instructions thereon, any issue, theory or defense which the evidence tends to support." 38 "Cyc.", page 1626, Note 69.

There are innumerable citations to nearly every state in the Union together with the Supreme Court of the United States under this Note in "Cyc" and we could cite a great many other cases but we think this rule will be admitted and is practically universal.

PROPOSITION III

> The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom.

The evidence in support of the defendant's theory of the case, we respectfully submit, was wholly uncontradicted and every legitimate inference from all of the evidence of the case showed unerringly, without dispute or contradiction, that this man was suffering from a diseased condition of his body which caused the pain, roaring and ringing in his ear. The medical testimony upon such a question is conclusive against mere lay testimony. Every indication showed that this man was diseased when he first came to the attention of the doctors; a condition

which had been growing for some time as the history of the disease indicates. He was thoroughly examined by many doctors who testified in this case, and they all agreed both for plaintiff and defendant, that he was suffering from kidney trouble. The only disagreement among the doctors was the extent of his disease. There was no evidence of any kind introduced showing that there was any injury to the ear such as could be occasioned by a blast. In face of this evidence, we respectfully urge that the verdict is not supported and that the trial court erred in refusing to set aside the same and to grant a new trial.

There can be no doubt from the testimony in this case that the man, at the time of the trial, was suffering from an advanced kidney trouble and we respectfully suggest that no doubt this condition was the controlling reason in the jurors' minds for the verdict against the Company, especially in view of the fact that proper instructions were not given to them.

CONCLUSIONS

We take the position that the judgment of the lower court should be reserved and an order entered instructing a verdict for Plaintiff in Error because of the lack of evidence to support a judgment against us.

However, the principal contention in this case is that the trial court erred in its refusal of our

instruction and if the Court does not feel it is its duty to enter a judgment for the Plaintiff in Error for the lack of evidence, then we respectfully and earnestly urge that the judgment in this case should be reversed and a new trial granted for the error in refusing to instruct as requested.

Respectfully submitted,

ANDERSON, GALE & NILSSON,
Attorneys for Plaintiff in Error.